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No. 80-359

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ERNEST T. ROSSIELLO, Attorney,
Petitioner,

v.

WILLIAM JOHNSON, JR. and DOROTHY JOHNSON, SIOUX CITY AND NEW ORLEANS BARGE LINES, INC. and ALLSTATE INSURANCE COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR WILLIAM JOHNSON, JR. AND DOROTHY JOHNSON IN OPPOSITION

JOHN R. SCHMIDT
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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, not yet reported, is set forth in the Appendix to the petition (pp. 2a-12a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 21, 1980. The petition for a writ of certiorari was filed on September 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the District Court and the Court of Appeals correctly construed a lawyer's contingent fee agreement in

a longshoreman's personal injury action to apply to the actual amount received by the longshoreman, excluding an amount payable to the longshoreman's stevedore in satisfaction of a lien.

STATEMENT OF THE CASE

The sole issue presented in this case is whether the District Court and the Court of Appeals correctly determined that the contingent fee payable to attorney Ernest T. Rossiello ("Rossiello") out of the proceeds of a personal injury action against a shipowner should be calculated on the actual amount received by Rossiello's clients, William B. and Dorothy Johnson ("Johnson"), or whether, as Rossiello contends, he is entitled to a percentage of the entire gross proceeds paid by the shipowner including that portion not payable to Johnson but subject to the lien of his stevedore as reimbursement for a previous workmen's compensation award. The facts of the case are set forth in the Court of Appeals opinion and can be summarized briefly.

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 (the "Longshoremen's Act"), permits an injured longshoreman to collect workmen's compensation payments from his stevedore and to sue in tort the shipowner upon whose vessel the injury occurred. To prevent double recovery the stevedore retains a lien in an amount equal to its compensation payments.

Longshoreman Johnson, after being injured in a barge accident, filed a claim for workmen's compensation against his stevedore, International Great Lakes Shipping Company (now represented by its insurer, Allstate Insurance Company), and a negligence suit against the owner of the

barge, Sioux City and New Orleans Barge Lines, Inc. Rossiello represented Johnson in both actions.

In the workmen's compensation action, a Department of Labor administrative law judge ordered that the stevedore pay benefits to Johnson in the amount of $40,438.50 and, pursuant to 33 U.S.C. § 928, ordered that the stevedore pay Rossiello a legal fee in the amount of $3,600. Subsequently the negligence action against the shipowner was settled for $64,000, of which $40,438.50 was subject to the stevedore's lien for reimbursement.

Rossiello had negotiated a contingent fee agreement with Johnson for the prosecution of his claim against the shipowner. The agreement provided that Johnson "hereby assigns to Rossiello 40% of any sums retained or recovered therefrom by suit, settlement or otherwise." Rossiello contended that this agreement assigned to him 40% of the entire $64,000 proceeds, notwithstanding that $40,438.50 inured to the stevedore as reimbursement for its compensation payments and that Rossiello had already received $3,600 for his services in generating the compensation award. District Court Judge Prentice H. Marshall rejected Rossiello's contention and ordered that Rossiello's 40% fee be calculated on the basis of Johnson's actual recovery from the shipowner ($64,000 less $3,824.05 in expenses and less the $40,438.50 compensation lien).

Johnson's gross recovery is thus $19,737.45, which yields Rossiello a fee of $7,894.98 in addition to the statutory award of $3,600; and Johnson's net recovery from the shipowner is $11,842.47. In contrast, if Rossiello were to prevail in his contention, he would receive a fee of $25,600; his client, Johnson, would receive nothing; and there would remain insufficient funds, $34,575.95, to pay the stevedore's lien in full.

In a unanimous per curiam opinion, the Court of Appeals upheld Judge Marshall's order.* The Court of Appeals found that as a matter of contractual interpretation the 40% fee should be applied only to the actual net recovery by Johnson. The Court noted that the agreement was apparently drafted on the assumption that the stevedore would share proportionately in the legal expenses of pursuing the negligence action, an assumption subsequently negated by this Court's decision in *Bloomer* v. *Liberty Mutual Insurance Co.*, 100 S. Ct. 925 (1980). The "reasonable reading of the agreement," the Court of Appeals stated, "is that Johnson agreed to pay Rossiello 40% of any recovery over and above the amount inuring to the stevedore." The Court found this construction of the language of the agreement to be reinforced by strong equitable considerations, noting that any attorney's fee must be reasonable and that an agreement which attempted to charge a fee based upon a proportionate share of amounts not recovered by the client "would contravene one of the underlying assumptions of a fair and reasonable contingent fee contract."

The Court of Appeals also found its construction of the agreement to be supported by the Longshoremen's Act and its underlying policies. Since the Act provides expressly for an award of fees for the recovery of the compensation benefits, a further award based upon those funds "would amount to little more than a double recovery for services rendered in generating the compensation award and would contravene Congress's statutory directive that the compensation tribunal determine the amount of the fee." In addition, the Court of Appeals found that Rossiello's proposed construction of the agreement was incon-

* Judge Marshall arranged for Johnson to be separately represented on the appeal and this brief is filed on Johnson's behalf by his new counsel.

sistent with the Congressional intent, emphasized by this Court in *Bloomer,* to reduce litigation. The Court of Appeals stated:

> "We are cognizant of Congress's concern that negligence suits under the Act too often inure to the benefit only of the attorney, thereby needlessly increasing the volume of litigation generated by the Act. . . . Yet this is precisely the outcome proposed. Indeed, Rossiello would recover a fee of over $25,000 plus expenses of nearly $4,000 for a settlement that in practical effect leaves his former client in a poorer position that he occupied the day before filing suit against the shipowner."

The Court of Appeals noted that its conclusion that the contingent fee applied only to Johnson's net recovery eliminated any question of priorities between the lawyer's fee and the stevedore's lien since sufficient funds would exist to pay both the attorney's fee and the stevedore's lien in full.

ARGUMENT

The Court of Appeals decided as a matter of contractual interpretation that Rossiello's contingent fee percentage applied only to the actual amount recovered by plaintiff Johnson in the negligence action. There is nothing in this contractual interpretation which conceivably warrants review by this Court.

Rossiello devotes his petition for certiorari to an issue —the priority of the attorney's lien vis-a-vis the stevedore's lien in longshoremen's negligence actions—which the Seventh Circuit expressly did not reach. The Court stated that it is "unnecessary to consider the relative priorities of the attorney's lien and the stevedore's lien because the settlement fund is sufficiently large to pay both in full."

Moreover, as a reading of the Court of Appeals' unanimous opinion demonstrates, the Court's conclusion is clearly

correct. The alternative conclusion—that Johnson had contracted for an arrangement under which his attorney Rossiello would take the entire available proceeds—is unreasonable and, as the Court noted, even if it were stated in the clearest terms, unconscionable. In addition to the considerations of contractual language and basic fairness, the Court's conclusion is reinforced by the policies of the Longshoremen's Act, including the establishment of a statutory mechanism for awarding fees in compensation actions and the policy of avoiding unnecessary litigation. Any one of these considerations, standing alone, would justify the Court of Appeal's conclusion.

There is no conflict between the Seventh Circuit decision and the decisions of any other Court of Appeals or of this Court. The decisions of other Courts of Appeals cited by Rossiello, insofar as they are relevant at all, deal with the issue of priorities between the attorney and the stevedore which the Seventh Circuit expressly did not need to reach in this case. Further, had the Court of Appeals reached this issue of priorities, its decision could not, contrary to Rossiello's suggestion, be inconsistent with this Court's decision in *Bloomer* because in *Bloomer* this Court expressly declined to reach any issue of priorities. See 100 S. Ct. at 932, n.13.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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